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No. 02-1674

IN THE

Supreme Court of the United States

MITCH McCONNELL, SENATOR, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF THE APPELLANTS

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INTEREST OF AMICUS*

The American Civil Rights Union (ACRU) was established in 1998 as a Section 501(c)(3) educational and legal charity dedicated to basic constitutional issues. Its purpose, as stated on its Internet webpage, is to advance civil rights because "Civil rights are the fundamental liberties that all Americans should enjoy as a matter of basic morality, as well as constitutional protection."

The Policy Board of the ACRU consists of: Hon. Robert B. Carleson, Chairman; Hon. Edwin Meese, III; Judge Robert Bork; Hon. Linda Chavez (Emerita); Mr. Joseph Perkins; Hon. William Bradford Reynolds; Professor James Q. Wilson; Ambassador Curtin Winsor, Jr.; Dean J. Clayburn LaForce; Professor Walter Williams; and the Hon. Ken Tomlinson (Emeritus).

The interest of the ACRU in this case is primarily the First Amendment rights of both individuals and private organizations, which are affected by the Bipartisan Campaign Reform Act.

This case represents the most extensive change in, and the most extensive judicial review of, the conduct and funding of federal elections since the bulk of the existing law was written in 1974 and reviewed in 1976 by this Court in the longest and most complex decision in its history. There are two basic reasons for ACRU's interest in this case: First, it concerns largely the First Amendment, and most of the

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* This *amicus curiae* brief filed in support of the Appellants was funded solely by the ACRU and is authored entirely by counsel for the ACRU.

briefs filed by the ACRU in all courts have been on basic First Amendment issues. Second, the ACRU is especially interested in the freedoms of association and of speech and press of private organizations both secular and religious. The ability of such groups and their members to participate as they deem appropriate in the political process is affected by BCRA in critical ways.

SUMMARY OF ARGUMENT

The Court entered an unusual Order in this case, saying that the parties "are to address the questions presented in the jurisdictional statements. . . ." and there are eleven such statements presenting a plethora of issues. Therefore it is incumbent on the American Civil Rights Union to make clear the few issues that it will address.

The first issue that ACRU will address concerns the various provisions that ban certain types of electronic advertising by certain organizations. In the view of ACRU, these provisions are the most obvious and noxious affronts to the First Amendment of the Constitution and should be specially addressed in the remedies that this Court applies.

The second ACRU issue deals with the provisions of BCRA which bar certain types of fund raising and communications — especially the tradition of forming tickets combining candidates for office at several levels — which has been part of American politics longer than the Constitution itself has been in effect. Such provisions, in the view of the ACRU, violate the First Amendment rights of those organizations and their members or adherents. They also violate the Tenth Amendment rights of the states and the citizens thereof.

The third issue that ACRU will address is the differing levels of permissible contributions to federal candidates. Section 305 sets limits of $2,000 in both primary and general elections, for a total of $4,000 for all congressional candidates. But Section 304 sets limits of up to "6 times the applicable limit" for senatorial candidates only, depending on how much self-financing the opposing candidate provides for his/her own campaign. That multiplies the maximum limit for personal contributions for senatorial candidates to $12,000 in both the primary and the general elections, for a total of $24,000.

For the reasons stated below, these differences are themselves a violation of the Fifth Amendment, and the lowest of these limits should be struck as unconstitutional. Because of the urgency of the impending election of 2004 for which fund raising is well underway, this too should be dealt with specially in the remedies the Court applies.

The final issue is the question of remedy, should this Court find as many, or even more, of the provisions of BCRA unconstitutional as did the special, three-judge District Court. If so, the ACRU argues that the Swiss cheese remnant of the law would not have been passed by Congress in that form, and that therefore the entire law should be declared unconstitutional.

ARGUMENT

I. Are the prohibitions of certain types of media advertising by organizations other than political parties themselves, a violation of the First Amendment?

This argument concerns the bans on electronic media advertising, which appear two places in BCRA. One of those provisions, Section 203, was upheld in part by the lower

court. The other, Section 201, concerned advertising by organizations of private citizens, thirty days before a federal primary election and sixty days before a federal general election. This ban was unanimously ruled unconstitutional by the trial court.

Most of the nations of the world, including England from which the United States borrowed the bulk of its laws, are unitary governments. The United States is, instead, a federal government. State political parties here, unlike local party groups in most nations, are not merely appendages of the national political parties. State parties (and their local affiliates) have separate interests, and separate First Amendment rights. This Court recognized such distinctions in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

Even clearer than those are the independent political and First Amendment interests of the 25,000 national organizations that have offices in Washington, D.C., to represent the joint interests of groups ranging from actuaries to zoologists. In addition to the organizations that are national, there are statewide organizations of many interests and occupations, ranging from farmers to bankers to motorists — all interests, all professions.

Some of those organizations choose to be apolitical. But many have a direct interest in decisions that can or will be made by Congress, and wish to express their support for the positions taken by some incumbents (and challengers), or opposition to those positions. It is self-evident that the expressions of such group opinions are most effective in the final weeks before an election, which is the precise period in which Congress sought to make such broadcast advertising

illegal unless such organizations placed themselves under the jurisdiction and control of the Federal Election Commission. All candidates for all offices demonstrate the fact that advertising close to any election is the most effective, by their choices to run most of their own ads at such times.

Why did a majority of both Houses of Congress choose to restrict the speech of these many and diverse voices of the American people close to the elections? Congress said why it was doing that, in the floor debates leading up to the passage of BCRA.

The following statements are taken from the floor debates immediately prior to final passage in each House, with the House of Representatives first, on 13 February, 2002. From Rep. Steny Hoyer, D-Md. (*Congressional Record*, 107th Congress, p. H340), "This legislation, in short, will ban so-called soft money contributions to the national political parties and prohibit soft money from being used for sham issue ads by third-party groups that most of us would agree are nothing more than campaign ads." From Rep. Christopher Shays, R-NY (*id.*, p. H342), "We limit no speech. We just say you cannot do it with corporate treasury money, union dues money, or unlimited money from individuals." From Rep. Jose Serrano, D-NY (*id.*, p. H347), "Campaign advertisements masquerading as issue advocacy must be regulated. Shays-Meehan will require that broadcast communications that mention a Federal candidate must be paid for with hard money — which includes corporate and union PAC funds — within 60 days of a general or 30 days of a primary election."

The Senate quotes are all from 20 March, 2002. From Senator Barbara Boxer, D-Calif. (*Congressional Record*, 107th Congress, p. S2101),

> Another good thing about McCain-Feingold: Those vicious attacks that have come from large soft money contributions will not be able to come 60 days before your election. That is a big plus because that is what we find — that candidates at the end simply cannot respond to this barrage of activity.

From Senator Paul Wellstone, D-Minn. (*id.*, p. S2097),

> If we had less of this money going to the parties but more of it going to all kinds of independent groups and organizations — "Americans For This" and "Americans For That" — that could raise $200,000, $300,000, $400,000, $500,000 at a crack and put it into these sham issue ads, I do not think we would be any better off.

From Senator Phil Gramm, R-Texas (*id.*, p. S2102),

> When did God decree freedom of speech existed only if one owns a newspaper or a television station or if they are a commentator? What about people who work for a living and who want to be heard? How can we write a law that treats the New York Stock Exchange differently from the New York Times? What this bill provides is unequal speech, privileged speech. So I am opposed to this bill because it is patently unconstitutional.

There is no doubt that most Members of Congress consider the presence of such independent voices in the process of federal elections to be an impediment to them and their parties in presenting their chosen messages as they run for reelection. Proponents of BCRA were consistent on that. But that reality offers zero justification for Congress to adopt this provision for the joint convenience of its Members. The First Amendment contains no exception clause, "Congress shall make no law respecting . . . freedom of speech (unless a majority of Members consider it really, really important) . . ."

This Court has recognized that the citizens' freedoms under the First Amendment are the most basic guarantees in the Constitution, because the preservation of all other rights depends on those. *See Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

Thomas Jefferson described the essence of press freedom better than anyone else when he wrote, "Were it left to me to have a government without newspapers, or newspapers without government, I would not hesitate for a moment to prefer the latter." (Letter to Col. Edward Carrington, 16 January, 1787. M.E. 6:57.) His point was that with freedom of the press, the errors or even the absence of government could be corrected; but without a free press, the errors of government would accumulate to general, national failure. What was the nature of the press whose freedom the Framers sought to assure through the First Amendment?

> [The Editor] hopes, by a constent and strict adherence to the freedom of the press, and a vigilant attention to the interests of his fellow-citizens, to gain their esteem, and receive an ample

> recompense for his labours. This paper shall (as far as possible) contain everything that shall offer which may be of service to the public: at the same time it will be constantly shut against everything of a scurrilous, or that may hurt the feeling of innocense. . . .

(Opening editorial, S. Arnett, Editor, *New Brunswick Gazette*, 5 October, 1786. Library of Congress, Periodical Collection, microfilms of early American newspapers.) [All spelling and punctuation are per the originals, except replacing the old-style "f" with "s."]

Later in the same issue, the *Gazette* printed this: "Why, Sir, Lawyers are a CONSEQUENCE and not a CAUSE of public evils. They grow out of laziness, dilatoriness in payment of debts, breaches of contract, and other vices of the people, just as mushrooms grow out of dunghills after a shower." [Emphasis in the original.] (*Ibid.*)

> If ever there was a devoted tool to a faction, the editor of the New York Minerva may safely be said to be one. If ever a man prostituted the little sense that he had, to serve the purposes of a monarchic and aristocratic junto, Noah Websters, Esq., must be the man.

(*Aurora General Advertiser*, 2 December, 1796. *Ibid.*)

> All those laws, which have disgraced probity, and stained national character, originated with men whose debts made them desperate, and disqualified them for any office of Government. . . . Will not Government and the most perfect constitution be

> considered a farce, when mean, low and worthless personage, who should act as candle-snuffers, strut o'er the public stage as Judges, Members, Representatives and Governors?

(*New York Daily Advertiser*, quoted in *Brunswick Gazette*, 4 September, 1787. *Ibid.*)

"To the Antifederal Junto in Philadelphia — With great regard, and sincere wishes for your success in everything that tends to anarchy, distress, poverty and tyranny, I am your friend and humble servant. Daniel Shays, Franklin State." (*Brunswick Gazette*, 2 October, 1787. *Ibid.*)

"If ever a nation was debauched by a man, the American nation has been debauched by Washington . . . the masque of patriotism may be worn to conceal the foulest designs against the liberties of the people." (*Aurora General Advertiser*, 23 December, 1796. *Ibid.*) This newspaper was located in New York state, which was a hotbed of Anti-Federalist sentiment. As atypical as this comment might appear to modern minds, the *Advertiser* was speaking both to and for its readers with this statement.

The ACRU asks this Court to examine the fractious, partisan and harsh press that existed when the First Amendment was demanded by the states, drafted by Congress, and ultimately ratified. Often the papers were founded by individuals for the precise purpose of supporting their favored political positions and candidates. That tradition continued for more than a century, which is why some of the nation's oldest surviving papers contain the word "Democrat" in their names.

All of the complaints that Members of Congress expressed about advertising by independent groups today, would have applied with even greater force to those newspapers. Additional proof of the highly partisan nature of the "press," for whose protection the First Amendment was drafted, is available. Several hundred issues of early American newspapers survive in the microfilm collection of the Library of Congress. Almost all were "broadsheets," printed on both sides of a sheet then folded to create a four-page newspaper. For a fast reader, reading them all is a single day's task.

The early American newspapers wore their politics on their sleeves, rather than up their sleeves. There could hardly be a better proof that these two provisions of BCRA are unconstitutional than that the kinds of public communications the Framers sought to protect in drafting and ratifying the First Amendment are the same kinds that Congress sought to stifle through BCRA.

The last time that Congress sought to silence critical voices in the press was the Sedition Act of 1798 (known as part of the collective "Alien and Sedition Laws"). The Federalists passed this Act, which provided even for jailing publishers who criticized the government (note that BCRA also provides for criminal penalties). This Court lacked the institutional strength to strike those laws down at the time. After the Democrat-Republican candidate, Thomas Jefferson, came into office as President in 1801, he pardoned and released the imprisoned newspaper editors, most of them supporters of his Party, concluding that the law was unconstitutional.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), at pps. 274-276, the Court finally stated that the Alien and Sedition Laws were clearly unconstitutional for seeking to silence independent voices of and for the people. In reviewing the history of those laws, the Court wrote, "The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."

As for the nature of the public discourse that the First Amendment protects, the *Sullivan* Court (at p. 268) cited with approval Judge Learned Hand's conclusion, "The First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues that through any kind of authoritative selection. To many, that is, and always will be, folly, but we have staked upon it our all."

The ACRU submits that exactly the same conclusion should be reached concerning the attempts to silence certain types of speech in the electronic press today. And it should be noted that most of the proponents of BCRA spoke about its advertising bans applying only to the broadcast media, but assumed such restraints could not be applied to the print media.

The proponents are right about the print media. As this Court recognized in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), a right of reply could not be imposed on any print media, as it then did apply to the broadcast media. Since most Americans now get the bulk of their political information from broadcast media rather than print media, the ACRU hopes and trusts that this Court in this case will not give second-class citizenship to the First Amendment rights of

the broadcast media. As the *Sullivan* Court noted at the outset of its analysis (p. 265), the First Amendment protects "the freedom of communicating information and disseminating opinion." [Citation omitted.] Defining "the press" by its public purpose as just described leaves no room for a lesser protection for those who would "publish" ads in broadcast media, rather than in print.

Also, corporate entities that wish to speak on public issues have First Amendment protection. *See First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978). In addition, those who publish paid advertisements even without political content have First Amendment protection. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748. So it should follow as a matter of course that the organizations that would broadcast advertisements concerning positions taken by Members of Congress should also have full First Amendment rights against the restrictive provisions of BCRA.

II. Are the restrictions on certain types of materials and spending by state political parties and state candidates a violation of both the First Amendment rights of those groups and candidates, and of the Tenth Amendment?

Cooperative efforts to support local, state and national candidates at the same time have a history in the United States older than the Constitution. The first political machine that developed such joint efforts was the Tammany Society in New York, founded in 1786, which Aaron Burr shortly turned into Tammany Hall, a dominant political power in the state and nation.

Such efforts involve creating tickets and raising and spending money for the tickets. Under Section 101, such funding and spending by state and local parties is inhibited. This Section also prevents federally-regulated money from being combined for materials that show federal candidates at the top of a ticket including state and local officials. The only possible basis for such a restriction is a presumption is that ticket materials constitute "gifts" to federal candidates' campaigns. This presumption is dead wrong, as can be seen from public records.

Election results are public records, of which this Court or any other court can take judicial notice. With a consistency above 99%, election results in every state and every congressional district in every even-numbered year in the 20th century show the same pattern. In every district, the top of the ballot — a federal candidate — receives the largest number of total votes. The bottom of the ballot, the local candidates, receives the lowest number of votes. Generally, the lower any race appears on the ballot, the lower number of total votes are cast in that race.

There are two sound reasons for this pattern. Federal candidates receive more "free ink," meaning press coverage of them and their positions without charge. State and local candidates cannot make up for the lesser amount of free ink by purchasing paid advertisements because they raise less money, both in gross dollars and in dollars per voter, than do the federal candidates.

The public record therefore shows that the "gift" from the inclusion on a ticket runs in the opposite direction. It is the state representative and the local sheriff who gain if a congressional or senatorial candidate agrees to put his or her

name at the top of a ticket, not the other way around. And there is no legitimate, or even arguable, justification for Congress telling a candidate for Congress that he cannot benefit state or local candidates by joining a ticket with them.

There is a First Amendment issue here, because the association of citizens, or candidates, or both together is how this Court interpreted the meaning of "freedom of association" under that amendment. *See Lubin v. Panish*, 415 U.S. 709 (1974).

Lastly, to the extent that the Tenth Amendment has any legal validity after *Garcia v. San Antonio Transit District*, 469 U.S. 528 (1985), it also militates against BCRA's attempt to bar joint funding of federal-state combined tickets. The Tenth Amendment's reservation of powers to the states and the citizens thereof, at minimum must apply to the central legislative decisions within each state about how election campaigns for its state and local officials should be funded and run.

Each state has established its own election laws concerning corruption, lobbying, public and private funding and campaigning. No two states have identical patterns, and none of them exactly match the federal provisions. Under a federal system of government, this diversity is to be expected.

For all these reasons, the American Civil Rights Union submits that all the provisions of BCRA which reach inside the states and seek to control state candidates and parties in their fund raising, campaigning, and campaign materials should be struck as beyond the power of Congress to enact.

III. Do the Bipartisan Campaign Reform Act's (BCRA) three different levels of permissible contributions to federal candidates necessarily contradict each other under the Fifth Amendment, and if so, which of those levels should be ruled constitutional?

As this Court made abundantly clear in *Buckley*, *supra* at p. 25, the legitimate purpose of federal election campaign laws is "the prevention of corruption and the appearance of corruption." This Court accepted in 1976 that Congress could, under that standard, adopt private contribution limits of $1,000 per election, or a total of $2,000 for a primary and general election.

When this limit remained unchanged for many years, a challenge was brought that inflation had diminished the value of the dollar and the limit should be judicially raised to keep pace with inflation. That argument failed, as did a similar case on the issue which sought to raise judicial salaries to keep pace with inflation. The most recent, detailed discussion of this subject appears in *Spencer Williams, et al., v. United States*, U.S. Federal Circuit, Case No. 99-1572. That court, following a clear precedent from this Court, concluded that courts have no power to allow for inflation unless Congress has acted finally by law. (Note that BCRA, for the first time, provides an inflation index for individual gift limits.)

In BCRA, Congress has made three decisions about the levels of private giving which do not involve "corruption or the appearance of corruption." In Section 305 it sets the level generally at $2,000 per election or $4,000 total. In Section 304 it sets that level for senatorial candidates only, at $12,000, or $24,000 total, depending on the fund-raising actions of the opponent. A similar provision for House candidates

appears in Section 319, allowing their maximum individual contributions to rise to $6,000 per election, and $12,000 total.

What is the difference between these three provisions, the general flat rates and the two sets of rising rates? The up to $6,000 senatorial limit applies to candidates ". . . if the opposition personal funds amount is over — (i) 2 times the threshold amount, but not over 4 times that amount — (I) the increased limit shall be 3 times the applicable limit; . . ." The threshold amounts are defined state by state, and the personal funds account is defined by how much money one's opponent contributes to his/her own campaign from personally controlled sources. If the opponent exceeds "4 times that amount," the candidate's limit rises to the maximum $12,000 per election. The House rate is similar, but jumps only once to $6,000.

But what are candidates who spend their own money in their own campaigns doing? According to this Court in *Buckley*, *supra* at p. 53,

> The primary governmental interest served by the Act — the prevention of actual and apparent corruption of the political process — does not support the limitation on the candidate's expenditure of his own personal funds. . . . Indeed, the use of personal funds reduces the candidate's dependence on outside contributions, and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed.

After rejecting the rationale of "equalizing the relative financial resources of candidates competing for elective

office," the *Buckley* Court concluded, "Second, and more fundamentally, the First Amendment simply cannot tolerate § 608(a)'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy. We therefore hold that § 608(a)'s restriction on a candidate's personal expenditures is unconstitutional."

There is a practical question here, also. It is equally impossible for a candidate to bribe himself as it is for him to tickle himself. It cannot happen. So the justification for the limit on self-financing falls.

In BCRA, Congress is attempting to give a special fund raising benefit to candidates whose opponents are highly self-financed. But since the *Buckley* Court has said that self-financing is a constitutional right, the special benefit for opponents of such candidates becomes a violation of the Fifth Amendment. The Constitution bars the government from acting against a citizen for exercising his or her constitutional rights. *See Perry v. Sinderman*, 408 U.S. 593 (1972), which concerned a college professor whose contract was not renewed because he made statements of which the administrators strongly disapproved. As the *Perry* Court wrote,

> [E]ven though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially his interest in freedom of speech.

408 U.S., at 597 (quoting *Speiser v. Randall*, 357 U.S. 513 (1958)). The *Perry* case involved state action and was decided

under the Fourteenth Amendment. The instant case concerns federal action, and the Fifth Amendment applies. The guarantee of "due process of law" is identical in these two amendments. Also, in elective politics there is no difference between a government denial of a benefit (as in *Perry*) and the granting of such a benefit to one's opponent (in BCRA). What aids your opponent necessarily harms you.

So far, it would seem that the $12,000 limit per election should be struck, leaving only the $2,000 limit. But what has Congress necessarily said by passing the $12,000 limit in the first place? It has reached a legislative judgment that $12,000 is the dividing line between "the appearance of corruption" and the lack thereof.

Consider this Court's decision in *Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173 (1979). That case concerned a special election to replace the late Mayor Daley, who had died in office. Under Illinois law, 35,947 signatures had to be filed to put a third party or independent candidate on the ballot for that election in Chicago. However, the law also provided that only 25,000 signatures were required to place such a candidate on the ballot in the entire state of Illinois for President, or for any statewide office.

In all its ballot access cases including *Socialist Workers Party*, this Court has consistently held that each legislature can establish a minimum level of community support that a third party or independent candidate must demonstrate by petitions to earn a place on the ballot. The Court noted that Illinois had set a 25,000-signature minimum statewide. Therefore a higher limit solely within the confines of Chicago was necessarily too high, and the Court struck it.

The same logic applies in the instant case, except that limits on individual donations to federal candidates are maximums rather than minimums. Congress has demonstrated its legislative judgment in Section 304, that $12,000 per election is the total limit to avoid the "appearance of corruption." Therefore, any lower limit set elsewhere in BCRA must be unconstitutionally low. (Occasional resort to the real world is appropriate — in 2002 all winning senatorial candidates exceeded or vastly exceeded $1 million in campaign spending, and the average of winning House candidates was more than $900,000. So the BCRA general limit of $2,000 per election is infinitesimal by comparison, and the $12,000 is still quite small.)

The ACRU therefore submits that this Court should strike the $2,000 general limit and leave the $12,000 limit standing. This conclusion makes practical sense as well as comporting with this Court's logic in *Socialist Workers Party*, *supra*. Given the inflation since 1974, when the $1,000 total limit on individual contributions to a candidate was first set, $6,000 (the House limit) in 2003 represents about the same spending power in constant dollars, and given the much higher cost of senatorial campaigns, $12,000 (the Senate limit) should also stand.

IV. Are so many parts of BCRA unconstitutional that the entire law should be declared unconstitutional? If so, how should the remedy be fashioned?

This Court is aware of the seven-year, tortured history of the passage of BCRA. The entire legislative history of the failure of many efforts to adopt such a law, and finally the passage of BCRA, is before the Court. Especially instructive is the back and forth bargaining that occurred both within the Senate and the House of Representatives, and between the leaders and Members of those Houses, in the final four months before the ultimate passage of this law.

"Horse trading" in the passage of legislation is a process older than the United States itself. It was seen in the Colonial legislatures, such as the General Court in Massachusetts and the Assembly in Virginia, that seized a measure of independence from their Royal Governors who in theory had an absolute veto. In all legislatures, horse trading means the same thing. When any complex legislation is on the table, and does not at the beginning claim a substantial majority, bargaining occurs between those who support the legislation and those on the fence. Until final passage of any such piece of legislation, the horse trading involves the inclusion of various provisions, or the exclusion of others, with the purpose of assembling a majority.

This Court explicitly recognized this process in *Buckley v. Valeo*, *supra*, at p. 108: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." [Citation omitted.] There, the Court used the

severability clause on Subtitle H, but declared that the make-up and appointment of the Federal Election Commission was unconstitutional across the board. So the *Buckley* Court left the remnants of Subtitle H standing, but ruled that the Commission could no longer exercise executive branch powers of any kind and gave Congress a month to reconstitute the Commission.

The logic behind both of the *Buckley* Court's conclusions is clear. In any law which contains a severability clause, Congress has recognized in advance that some provisions may not survive constitutional scrutiny, but the other parts of the law should remain. However, as this Court recognized in *Buckley* and cases there cited, beyond a certain point the Court has struck such an important part of a law that the remainder might never have been passed by Congress in that form.

In that circumstance, the Court should do what Circuit Judge Henderson concluded in the District Court panel. So much of the law may be struck that this Court should not attempt to rewrite the law as if it were the legislature, but instead should place that task back in the hands of Congress.

A special circumstance applies to this Court's review now, as it did in *Buckley* in 1976. For major offices such as President and Senator, fund raising is well underway, and for House candidates it is not far behind. The *Buckley* Court concluded that the Federal Election Commission itself had to be declared unconstitutional, but it took the rare step of staying its final Order to that effect for thirty days, to give the legislative branch the opportunity to rewrite the law in accord with the conclusions reached by this Court. As the *Buckley* Court said, at p. 143, "This limited stay will afford

Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, . . ."

And given that opportunity in 1976, Congress did rewrite the law in accord with the Court's findings under the First Amendment (and the separation of powers, which was also a critical issue in *Buckley*). In 2003, with a national election just around the corner — and already begun from the standpoint of fund raising and position-taking by candidates and national and state parties — this Court should afford Congress a similar opportunity to rewrite BCRA.

CONCLUSION

For the reasons above stated, and similar reasons that applied when this Court decided *Buckley*, the American Civil Rights Union submits that the Court should determine that too many of the original provisions of BCRA are unconstitutional for the balance of the law to remain standing, even considering its severability clause. For the same reasons, then as now, the ACRU submits that the Court should not simply strike BCRA immediately, but should stay its hand and its final Order for a limited period, perhaps more than the thirty days allowed in *Buckley*, to permit Congress to rewrite the law in accord with this Court's decision.

The broadcast media, especially television, are the principal means of communication in American elections today. The broadcast advertising bans are the most obviously unconstitutional provisions in BCRA. And broadcast advertising on issues and positions has already begun, looking forward to the elections of 2004. For these reasons, ACRU

submits that notwithstanding the thirty-day delay for Congress to reenact a corrected BCRA, this Court should make its Order striking the broadcast advertising provisions effective immediately.

Fund raising for federal candidates has already well begun. All such fund raising will accelerate, as it always does, in the final months before the year of the election.

Therefore, with respect to the question of $2,000 or $12,000 limits on individual contributions per election, the ACRU suggests that the Court make its Order on this effective immediately as well. For the benefit not just of hundreds of candidates for federal office, but of hundreds of thousands of citizens who wish to support such candidates, the ACRU urges the Court to strike the lower limit and leave the higher ones standing, now.

This Court has taken unprecedented steps to convene on 8 September and hear this case on an accelerated basis. This Court recognizes, as it did in 1976, the critical First Amendment impact of laws that reshape the conduct of federal elections. Therefore, the ACRU urges the Court to speak thoroughly and clearly to Congress about the provisions of BCRA which are unconstitutional, and those which pass constitutional muster, so the rewriting of BCRA by Congress will become a solid and sustainable pattern for the conduct of the 2004 elections and, it is hoped, many elections to come.

Respectfully submitted,

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